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February 24, 2000

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99-251

Secretary
Federal Communications Commission
The Portals
445 Twelfth Street S.W.
Washington, DC 20554

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AUDIO SERVICES
DIVISION

FEB 25 2000

FCC MAIL ROOM

Dear Commissioners and Staff:

THE AMHERST ALLIANCE submits a Motion For Reconsideration of FCC Order No. 00-19, which establishes a Low Power Radio Service. The release date of this Order was January 27, 2000.

Enclosed are 15 copies of the Motion plus an original.

A Motion For Reconsideration is often a prelude to a lawsuit and/or some other form of attack upon a new rule. However, that is NOT the case here. We regard the new rule as a vast improvement over the pre-existing status quo -- and we applaud the Commission for its action. Indeed, we strongly defended the rule in February 17 testimony before the House Telecommunications Subcommittee.

We are filing this Motion For Reconsideration solely because, to the best of our knowledge, such a Motion is the ONLY legally permissible way to communicate our feedback to the Commission at this point. We consider ourselves to be among the strongest supporters of what the FCC has done, but we still have some important concerns and recommendations.

In the enclosed Motion, we have presented our requests in ascending order of controversy: that is, with the LEAST controversial requests first. The first 2 recommendations relate to IMPLEMENTATION of the rule, rather than its text.

RECOMMENDATION ONE: Establish a Low Power FM Advisory Committee, similar to other industry advisory committees which already exist to advise the FCC. A majority of the Members should be current or aspiring LPFM licensees, but at least a third should be drawn from among listeners and the general public.

RECOMMENDATION TWO: Initiate an Automatic Program Review after 2 years of actual working experience with the Low Power Radio Service. This Review should be held before the scheduled expansion of the Low Power Radio Service in 2002.

RECOMMENDATION THREE: Clarify that “educational” station status is indeed available for LPFM licensees who: (a) are primarily or exclusively oriented toward ENTERTAINMENT programming, provided that (b) the form(s) of entertainment being offered would not otherwise be available on the airwaves of the community involved.

RECOMMENDATION FOUR: Take action to prevent pre-emption of otherwise available frequencies by conventional broadcasters who: (a) are using the application process to “warehouse” frequencies for possible future use; and/or (b) filed applications between receiving “constructive notice” of the proposed rule on LPFM (February 26, 1999) and the end of the LP10 filing window.

RECOMMENDATION FIVE: Initiate special policies to permit the establishment and survival of LP10 stations in large urban areas where they would otherwise be virtually (or totally) non-existent. Specifically, establish an “ENDANGERED SPECIES” EXEMPTION, replacing Secondary Service Status with MODIFIED Primary Service Status in areas where no more than 3 LP10 stations can be sited. In areas where NO Low Power Radio stations can now be sited, establish up to 2 closely monitored DEMONSTRATION STATIONS per city. For an experimental period of 2 years, the normally applicable second adjacent channel restrictions should be waived and the results assessed. IF no dire consequences ensue, the experimental arrangements can be made permanent and the nationwide channel spacing rules can be reconsidered.

We urge the Commission to reconsider its final rule on LPFM -- to the extent necessary to accommodate the requests in our Motion For Reconsideration.

Sincerely,

A handwritten signature in black ink, reading "Don Schellhardt", with a long horizontal flourish extending to the right.

Don Schellhardt,
THE AMHERST ALLIANCE

MOTION FOR RECONSIDERATION BY THE AMHERST ALLIANCE

FCC Report & Order No. 00-19:

In The Matter Of
Creation Of A Low Power Radio Service

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UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
THE PORTALS
445 TWELFTH STREET S.W.
WASHINGTON, DC 20554

In The Matter Of

FCC Order No. 00-19

Creation Of A)
Low Power Radio Service)

Docket No. MM 99-25
RM-9208; RM-9242

MOTION FOR RECONSIDERATION
BY THE AMHERST ALLIANCE

THE AMHERST ALLIANCE is a nationwide citizens' advocacy group, organized and mobilized primarily over The Internet, which advocates media reform in general and Low Power Radio in particular. We were founded on September 17, 1998, in the small college town of Amherst, Massachusetts, and we have been active participants in the proceedings which culminated in FCC Report & Order No. 00-19.

We commend the Commission for its vision and courage in issuing this Report and Order. The new Low Power Radio Service will be a blessing to the nation -- and a vital "beachhead" for further reform.

Nevertheless, we file this Motion For Reconsideration for the purpose of:

(A) Identifying for the Commission certain aspects of the new Low Power Radio rule which have caused concern among aspiring LPFM broadcasters;

And

(B) Offering to the Commission certain suggestions which relate to implementation of the new rule, rather than its current substance.

While a Motion For Reconsideration can be a prelude to a lawsuit, that is far from our intention here. We support the new rule -- as a vast improvement over the status quo which preceded it. Indeed, THE AMHERST ALLIANCE has already testified in defense of the rule during February 17 Hearings before the House Telecommunications Subcommittee.

Our Motion is simply being employed as a legally permissible mechanism for providing one last round of feedback to the Commission before the new rule has solidified completely.

We will present this feedback in ascending order of potential controversy: that is, with the LEAST controversial recommendations first.

Formation Of A Low Power FM Advisory Committee

1. Our first point relates to IMPLEMENTATION of the new rule -- rather than the details of its substance.

Within the first year of the rule's implementation, the Commission should establish a Low Power FM Advisory Committee. This Advisory Committee would be comparable to the Commission's existing Advisory Committees, which are composed of representatives from other industries regulated by the FCC.

Ideally, a majority of the Advisory Committee should be drawn from the ranks of actual (or at least aspiring) LPFM licensees. At least a third of the seats, however, should be reserved for members who can represent LPFM listeners and/or the specific communities being served and/or the public interest in general.

(A) One task of this group should be working with the FCC to develop a practical agenda for (and possibly identify funding and/or investment sources for) Research, Development and Demonstration -- or even technology commercialization -- by LPFM broadcasters. Obviously, such broadcasters lack the capital and other resources that are available to larger, more established broadcasters. On The Other Hand, Apple Computer was started in a garage.

Some farsighted LPFM advocates have already identified possibilities for groundbreaking research in areas such as infrared broadcasting and Digital LPFM. Nickolaus and Judith Leggett, 2 of the 3 Co-Petitioners in RM-9208, have expressed strong interest and are conveniently located in Reston, Virginia.

(B) The LPFM Advisory Committee could offer insight, information and possibly recommendations on such matters as syndication and/or exchanges of original programming material, LPFM operating conditions, adaptation to Digitalization and/or monitoring and enforcement of radio interference (perhaps including a degree of responsible "industry" self-regulation). The Committee could also be a source of valuable input for the 2002 Automatic Program Review, which we propose below.

Automatic Program Review In 2002

2. Our second Recommendation also relates to IMPLEMENTATION of the new LPFM rule, rather than its text.

The FCC has chosen to proceed very cautiously on matters related to radio interference. It has withdrawn its earlier proposal to relax the second adjacent channel spacing restriction, deciding for now to relax only the third.

We are not pleased with this decision, which will greatly restrict opportunities for LPFM stations in signal-rich urban areas. However, we know that the FCC is entering a new area and may be inclined to "err on the side of caution".

We note, however, that an automatic expansion of the Low Power Radio Service is planned after the first 2 years of operation: that is, presumably in 2002. By that time, the FCC should have a solid base of information and experience about how Low Power Radio works in practice.

We believe the Commission's actual experience with LPFM will lay to rest its current concerns regarding possible radio interference. Therefore, we ask the Commission to couple the "scheduled" expansion of the Low Power Radio Service, in 2002, with an Automatic Program Review at the same time.

This Automatic Program Review should include a public comment period of reasonable length.

As we noted earlier, the proposed LPFM Advisory Committee may prove very helpful to the Commission in exploring the various issues. **AT A MINIMUM**, the following options should be fully considered, based on actual experience:

(A) As advocated above, the relaxation of second adjacent channel restrictions should be carefully considered. The possible reduction of geographical "buffer zones" should also be considered.

(B) In light of the actual volume of LPFM applications, the actual availability of frequencies and the actual operating profiles of LPFM stations. the possible need for a Low Power AM Service should also be examined.

(C) The Commission should explore the possible need for special "tailoring" of policies to accommodate the special needs of LPFM broadcasters (and aspiring LPFM broadcasters) in large urban areas with densely compacted spectrum. Such needs may include wattage ceiling adjustments, to take buildings and other "man-made topography" into account, as well as incentives for (and/or special accommodations of) time-sharing.

(D) We are delighted by the demise of the proposal to license 1,000 watt LPFM stations in urban and suburban areas. In fact, we agree with the FCC that it is neither wise nor reasonable to license LP1000 stations ANYWHERE.

As a general rule, the FCC's power ceilings of 50 to 100 watts, with 1 to 10 watts as an additional option, are reasonable and workable in most of the areas where listeners live. In general, we oppose LP stations above 100 watts.

However, we remain inclined to believe that 250 watts -- the current power ceiling for satellator stations -- may be advisable, or at least justifiable, in the special case of certain small cities and rural areas.

Thus, we urge the FCC to review its actual working experience with LPFM, in small cities and rural areas, during the Automatic Program Review Review of 2002. IF actual experience demonstrates that the benefits and drawbacks merit such action, we urge the Commission to license LP250 stations in these areas.

We are aware that actually defining "small cities and rural areas", for the purpose of implementing LPFM, can be a tricky proposition. Amherst has previously proposed, in Written Comments on the proposed rule, that LP250 stations should be considered in areas with 1,500 people per square mile or less. REC Networks has suggested licensing of such stations in locations outside the 50 largest media markets: a threshold which is somewhat less precise but clearly easier to administer. Either yardstick would be acceptable to us.

We have since thought of a third possible yardstick, which would probably be more restrictive in its scope of eligibility. That is: The licensing of LP250 stations should be considered, during the proposed Automatic Program Review of 2002, in areas where one or more satellator stations are operating and/or one or more license applications for satellator stations have been filed.

We believe it safe to presume, rebuttably, that areas with satellators have a fairly low population density and a paucity of local programming.

(E) We strongly recommend that the Commission, during the course of its Automatic Program Review of 2002, should reconsider its current rejection of MODIFIED Primary Service Status for LP100 and LP10 stations.

The concept of Modified Primary Service Status was developed and advocated by THE AMHERST ALLIANCE in Written Comments on the FCC's proposed rule. Under this concept, the new LPFM stations could neither "bump" -- nor be "bumped" by -- existing broadcast facilities. They would be safe from displacement, but they would not pose a threat of displacement to other stations which are already on the air.

We urge the Commission to reconsider our proposal, in 2002 or earlier, because it may prove VITAL for the long term survival -- or even the short term survival -- of newborn LPFM stations. This is CLEARLY a matter of survival in the urban cores of large metropolitan areas, where the spectrum is already very crowded, and it may be a matter of survival in other markets as well.

We remind the Commission that the Communications Act of 1934 directs it to establish "the EQUITABLE and efficient" distribution of radio spectrum -- NOT just the "efficient" allocation of spectrum, in the narrow engineering sense.

(Emphasis supplied)

We challenge the narrow prevailing concept of what constitutes "efficiency". Modified Primary Service Status for 10 watt stations in urban areas may not be "efficient" in the strict sense of providing the most square miles covered per watt. However, it is SOCIALLY efficient in the sense of providing the most options per listener. In TODAY'S world, which is NOT the world of 1934, it is the options per listener that count -- at least with the listeners, if not with the broadcasters.

Further, even back in 1934, the drafters of the Communications Act were concerned with spectrum EQUITY as well as spectrum efficiency. Unfortunately, the word "equity" rarely surfaces when established broadcasters discuss the allocation of spectrum today.

It's time for equity to make a comeback.

To this end, among others, we again urge the Commission to consider Modified Primary Service Status for all LPFM stations before the scheduled program expansion of 2002. In the immediate future, we urge the Commission to initiate the more limited steps proposed in Recommendation 5.

**Clarification That Entertainment-Oriented Stations
Can Be "Educational"**

3. As we have apprised the FCC on earlier occasions, aspiring LPFM broadcasters account for roughly one third of our Membership -- and about two thirds of our Board Members. Of these potential LPFM licensees, at least half are primarily concerned with providing some form of entertainment. This usually means music, but it can also mean drama, humor and other art forms.

Virtually all of these entertainment-oriented individuals are ALSO interested in providing news and information (particularly of a local nature). However, for many or most of the potential LPFM licensees within Amherst, the primary goal is the provision of entertainment programming that is not currently available in their communities (or, in many cases, virtually anywhere on the airwaves). Examples of such entertainment programming include smooth jazz (a rarity outside of large metropolitan areas and sophisticated college towns), polka, science fiction plays, mainstream Spanish language music, madrigal singing, live high school football games, live "poertry slams" and much, much more. Often, the same potential LPFM station intends to offer much more than one kind of comparatively uncommon entertainment programming.

Although, in an ideal world, most of the aspiring broadcasters within Amherst would prefer to have the right to air commercials, we can accept “non-commercial” status as a tolerable tradeoff for protection from license auctions -- particularly since we will be able to pursue underwriting under the same rules as National Public Radio.

In its rule, however, the Commission has NOT just required that LPFM stations must be “non-commercial” stations. They must be “non-commercial EDUCATIONAL” stations. (Emphasis supplied)

Some of us are deeply concerned that the Commission may interpret the word “educational” to encompass ONLY informational programming (or, under a recent Commission decision, evangelical programming). This possible preclusion of entertainment-oriented LPFM programming would smash the dreams of many an aspiring LPFM broadcaster -- and would constitute a major, palpable loss to the listening public of America.

In short, we do not want LPFM to be “a little NPR”, full of news, talk and Programming That Is Good For You. Room should be left in Low Power Radio for Just Plain Fun.

Like Orson Welles used to have.

Some Amherst Members do not believe that it is necessary for the FCC to clarify this point. They consider it self-evident that “educational” programming may include entertainment alternatives to offerings in the mainstream media.

Others among us are not so sure.

We urge the Commission to clarify this matter -- NOW, while the nation's LPFM aspirants are planning their license applications and perhaps drawing up papers for incorporation as non-profits.

We ask the FCC to indicate, publicly and visibly, that "educational" status will be available to LPFM stations which are primarily entertainment-oriented, or even exclusively entertainment-oriented, IF the station will bring to the airwaves of its community one or more forms of entertainment that are not currently available to local listeners.

If this is NOT how the Commission intends the word "educational" to be interpreted, then we ask the Commission to re-write its rule, where necessary, to authorize non-commercial LPFM stations which offer such entertainment..

Excluding entertainment programming from LPFM would be a theft of dreams -- for broadcasters and listeners alike.

Preventing Pre-Emption Of Frequencies

4. We are concerned that many otherwise available frequencies will have been pre-empted by the time that LPFM applicants are legally able to express their interest in these frequencies through an application. If these frequencies have been pre-empted in the normal course of decision-making by established broadcasters, the pre-emptions might be defensible as "the luck of the draw".

However, we see an IMMEDIATE NEED for protective action to prevent ARTIFICIAL pre-emptions which are initiated for ANTI-COMPETITIVE purposes.

(A) Some broadcasters have been filing applications, directly or through intermediaries, which stake a claim to frequencies in multiple markets. The "leader of the pack", at least at the moment, is a NON-commercial broadcaster with a chain of evangelical stations. With this broadcaster, and others, we can see an apparent pattern of "warehousing" frequencies for possible future use -- at the potential expense of LPFM applicants who would go on the air now.

For documentation, we refer the Commission to the various filings on this topic by REC Networks of Tempe, Arizona.

As corrective action, we ask the Commission to override the "staked claims" of larger broadcasters -- on a case-by-case, frequency-by-frequency basis -- where the Commission determines that: (i) the broadcaster in question is engaging in a multi-market pattern of "warehousing" frequencies; and (ii) the LPFM applicant(s) in question would broaden more fully the range of choices for local listeners.

(B) On page 26 of its Report and Order, the Commission states that new LPFM stations will be "required to protect the existing service of FM translators and booster stations and LP100 facilities".

We urge the Commission to extend the same protection to LP10 stations, at least in those densely populated urban areas where even LP10 stations are likely to be rare -- and LP100 stations are likely to be non-existent. Also: See the proposed "Endangered Species" Exemption in Recommendation 5(A), below.

(C) On the same page of Report and Order No. FCC 00-19, the FCC further states that new LPFM stations will be "required to protect full-service FM, FM translator and LP100 facilities proposed in applications ... filed before a public notice announcing an LPFM application filing window." This protection will not extend to facilities proposed in applications filed "after the release date of an LPFM application filing window."

We can accept the CONCEPT of "grandfathered" applications, but we challenge the DATE for cutting off eligibility. By setting a cutoff date which is months after the issuance of the LPFM rule, the Commission is effectively 'ringing the dinner bell' for established interests to pre-empt all of the frequencies they can before their LPFM competitors are legally able to arrive on the scene.

There are obvious anti-competitive implications if the Commission proceeds with authorizing this multi-month "headstart" for established interests. The number of frequencies that are left for new LPFM stations could be reduced dramatically -- for reasons which bear no relation to the public interest.

The concept of a "filing window" -- which we SUPPORT -- has often been compared to "the Oklahoma Land Rush". In this case, unfortunately, history may be repeating itself too precisely for comfort.

In the REAL Oklahoma Land Rush, some aspiring settlers crept over the starting line the night before, staking their claims to the theoretically "wide open" land before the official competition had begun. These settlers acquired the nickname "Sooners", because they literally "jumped the gun" on the Land Rush. Apparently, they were numerous enough to give the entire State of Oklahoma its nickname: "The Sooner State".

The Oklahoma "Sooners" of the 19th century were mostly poor individuals, acting without the benefit of government approval. The electronic "Sooners" of this NEW century, however, will be mostly megacorporations, already enjoying vast wealth and "jumping the gun" at the Commission's invitation.

Unless, of course, the Commission changes its mind before it's too late.

We ask the Commission to roll back the cutoff eligibility date to February 26, 1999. This is the date on which the Commission believes that unlicensed broadcasters should have changed their behavior because they had "constructive notice" that LPFM was being proposed. It is logical to assume that established broadcasters had "constructive notice" on the same date (if not earlier!). Therefore, applications filed after February 26, 1999 should be automatically suspect and presumed, at least rebuttably, to be anti-competitive.

An eligibility cutoff date of February 26, 1999 is both logical and reasonable. If the Commission cannot accept this date, it should AT LEAST roll back the eligibility cutoff date to January 20, 2000: the date on which the Commission adopted the final rule which authorizes a Low Power Radio Service.

As an alternative way to reach the same goal, the FCC could impose a temporary "freeze" on filing of Construction Permits by full power broadcasters on or after January 20, 2000. The "freeze" would extend until the end of the LP10 filing window (or, AT A MINIMUM, until the end of the LP100 filing window).

Construction Permit applications filed on or after January 20, 2000 -- but before announcement of the "freeze" -- would be dismissed, without prejudice, and removed from the engineering databases. The applications could be re-filed after the end of the LP10 filing window.

LP10 Stations

5. With its decision not to relax the second adjacent channel spacing requirements, the Commission has already assured that LPFM stations will be few in number in large urban areas -- despite the demonstrated local demand for them in places such as metropolitan Detroit, Baltimore and Boston. Unless Modified Primary Service Status is offered to LPFM stations, at least in areas such as metropolitan Detroit, the few LPFM licensees who actually make it to the airwaves may be "easy pickings" for stations hawking The Same Old Same Old.

(A) The Commission should establish an "ENDANGERED SPECIES" EXEMPTION where LPFM stations are few in number and face a high risk of displacement. This proposed exemption would waive the otherwise applicable Secondary Service Status, replacing it with Modified Primary Service Status.

We believe our proposed Endangered Species Exemption should be extended AUTOMATICALLY to any LPFM applicant who: (I) applies for an LP10 license (that is, a license to broadcast at 10 watts or less); and (II) seeks this license in an area where the Commission has determined that no more than 3 LPFM frequencies are available at the time of the license application.

If the Commission wishes, the Endangered Species Exemption could be made subject to automatic review when the license comes up for renewal.

(B) In urban areas where there is currently NO room for LPFM stations, we ask the FCC to license a handful of LP10 "Demonstration Stations". The stations should be exempt from second adjacent channel restrictions and should also be accorded Modified Primary Service Status. This would provide actual working experience with LPFM in such areas, allowing the FCC to assess directly the impact of relaxing second adjacent channel restrictions in a "worst case" setting. To permit intensive monitoring, we recommend licensing no more than 2 Demonstration Stations in each of 5 to 10 cities. We also advise an experimental period of 2 years, timed to conclude during the 2002 Automatic Program Review. IF no dire consequences ensue, the arrangements can be made permanent.

CONCLUSION

For the reasons set forth above, THE AMHERST ALLIANCE urges the Federal Communications Commission to reconsider the provisions of Report and Order No.00-19 and adopt the modifications we have proposed in Recommendations 3, 4 and 5 of this Motion For Reconsideration.

We further urge the Commission to adopt Recommendations 1 and 2 of this Motion For Reconsideration, which relate to the IMPLEMENTATION of Report and Order No.00-19, rather than its current text.

Respectfully submitted,



Don Schellhardt

National Coordinator and Co-Founder,
THE AMHERST ALLIANCE

Co-Petitioner, FCC Docket RM-9208

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Dated: February 24, 2000
February 24, 2000